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FEDERAL COMMUNICATIONS COMMISSION
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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

FCC 93-177

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

MM Docket No. 92-266

Rate Regulation

To the Commission:

**MICHIGAN C-TEC COMMUNITIES
PETITION FOR RECONSIDERATION**

Several franchising authorities in Michigan who receive cable service from C-TEC and which are informally cooperating on rate regulation ("Michigan C-TEC Communities") submit this petition for reconsideration of the Commission's May 3 Report and Order in this docket so as to allow for meaningful rate regulation under the Cable Television Consumer Protection and Competition Act of 1992 ("The Act" or "1992 Act").

Michigan C-TEC Communities respectfully suggest that the application of the 30% test for determining effective competition be clarified, especially in situations where a cable operator serves only a portion of a community and refuses to extend its lines into the balance of a community due to a claimed lack of sufficient customer density; and that the Commission clarify §76.938 of its regulations relating to proprietary information to make clear that this regulation preempts any conflicting state or local requirements.

Michigan C-TEC Communities generally support the points made by NATOA and by King County Washington, et al in their Petitions for Reconsideration in this docket even

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though for reasons of brevity and economy Michigan C-TEC Communities do not comment in detail on the points made in such other petitions.

I. MICHIGAN C-TEC COMMUNITIES' REPRESENTATIVES

All communications and correspondence relating to this matter should be directed

As Michigan C-TEC Communities prepare to regulate rates (or have them regulated by the FCC) they became aware of the matters set forth below in the Commission's May 3 Report and Order which should be addressed so as to provide for effective regulation.

Michigan C-TEC Communities know that the comments set forth below apply to many other communities who as yet have not had time to examine this Commission's May 3 order. For example, the comment on effective competition may apply to as many as half of Michigan's 1200 townships (which predominantly encompass less populated rural areas). The comment on proprietary information would apply to all communities in Michigan and likely many communities in other states as well.

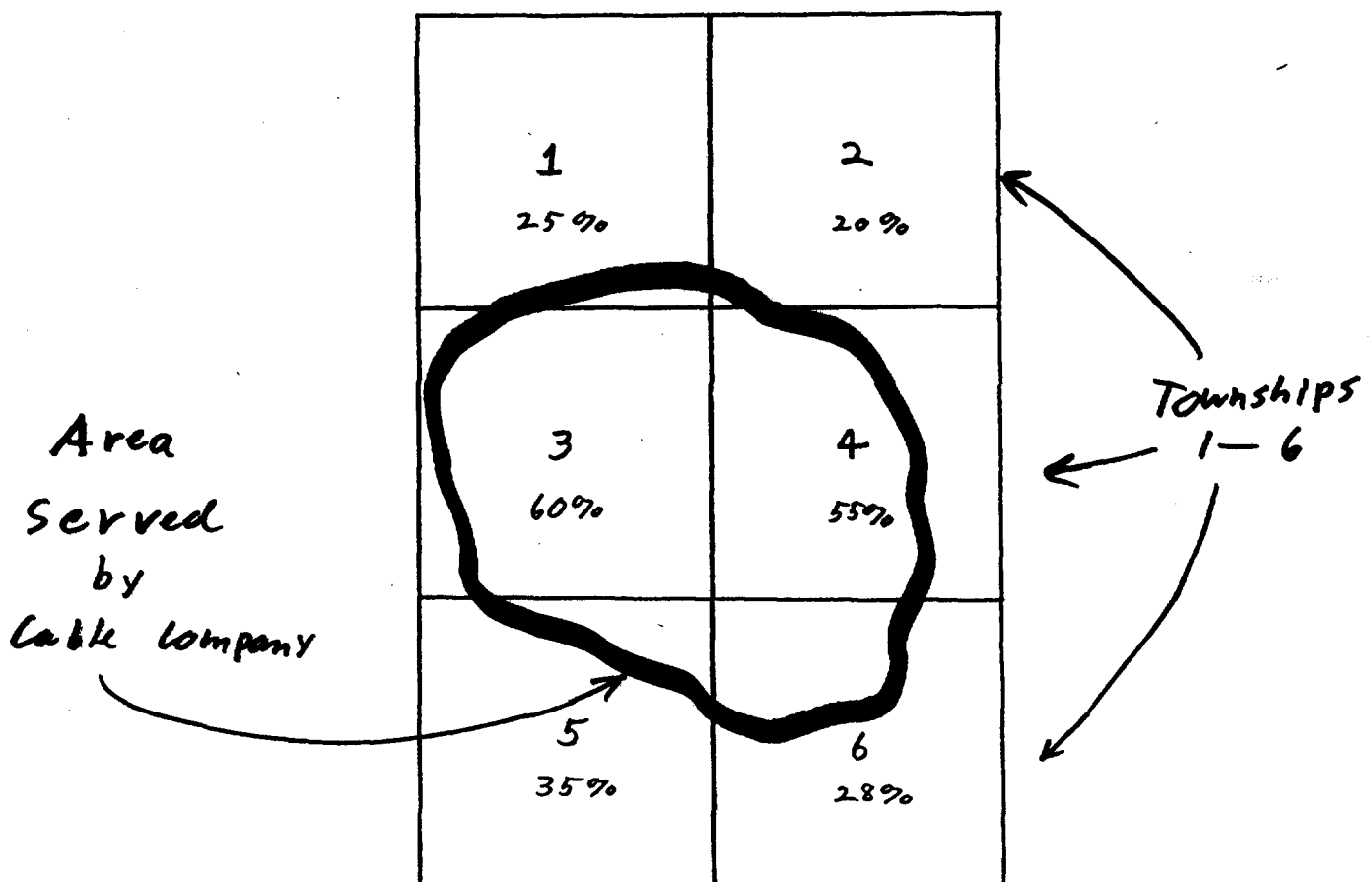
III. MICHIGAN C-TEC COMMUNITIES' COMMENTS

As Michigan C-TEC Communities prepare to regulate rates (or have them regulated by the FCC) they became aware of the matters set forth below in the Commission's May 3 Report and Order which should be addressed so as to provide for effective regulation.

cable company. Such franchises are rarely lengthy--usually they are one to two pages long, and can be as short as one sentence.

And although the population of the townships is small, their geographic area is large. For example, some townships in Michigan's Upper Peninsula are well over 150 square miles in area, yet have cable service only in the two to five square mile area that contains a few stores, businesses, school and some housing.

A comparable factual situation occurs on the outskirts of more populated areas, where in townships adjoining a populated area the cable operator has a franchise for the entire township, but refuses to extend its lines to the more rural areas of the township, claiming inadequate customer density.



These situations are shown diagrammatically on the preceding sketch, where the thinner lines are the boundaries between townships 1 through 6, and the heavy line is the populated area, which is the only area served by "XYZ Cable Company". The percentages are the number of households served if the percentage is computed using as the denominator the number of households in the township as a whole. Because XYZ has a penetration rate (homes served/homes passed) of 65%, the percentages are all around 65% if "households served" is computed using the number of households in the area XYZ actually serves or is ready to serve (e.g., with minimal additional investment).

Michigan C-TEC Communities respectfully request that the Commission clarify its order and § 76.905 of its rules to specify that in situations such as those just described, that the 30% effective competition test is met in all 6 townships, such that cable rates can be regulated in all 6 communities (either by the township or by the FCC). Michigan C-TEC Communities are concerned that unless such clarification occurs that:

- At minimum there will be a lengthy stay of rate regulation in communities such as Townships 1, 2 and 6 on the such attached diagram (due to the automatic stay of rate regulation under this Commission's rules if a cable operator challenges a community's certification on effective competition grounds), or
- At worst there will be a crazy-quilt pattern of rate regulation with cable rates regulated in communities such as Townships 3, 4 and 5 but not regulated in Townships 1, 2 and 6. Such a result would not reflect the underlying economic reality--that there is no effective competition--and makes no sense.

Specifically, the term "effective competition" in section 623 (1) (1) of the Act has to be construed in terms of its purpose, just as this Commission did in concluding (paragraph

422 of the Report and Order) that the "geographic area" over which cable rates must be uniform means the area franchised by a community (and not the several communities served by a given cable system).

The intent of Congress with the effective competition test is to determine whether there is sufficient competition in a given area such that regulation is not necessary to keep cable rates under control and remove monopoly profits. It is apparent that this intent is not met if (as cable operators' presumably will argue) the 30% test is computed using as the denominator all the households in the community, even if they are in areas where the cable operator is franchised but refuses to serve. Using such a method rates would be subject to regulation only in Townships 3, 4 and 5 but would be unregulated in Townships 1, 2 and 6. Such a result does not square with the underlying economic realities.

Michigan C-TEC Communities respectfully suggest that the Commission clarify its order and § 76.905 of its rules such that the "technically and actually available" requirements of subsection (e) (1) and (2) of § 76.905 also apply to part (b) (1) of the rule

B. Proprietary Information: The Commission found in the Report and Order that it is essential for a franchising authority to examine actual costs in order to make an informed determination as to the reasonableness of a cable operator's rate proposal when the cable operator seeks approval of rates exceeding the Commission's presumptively reasonable level. Actual cost information will also be needed (such as on equipment costs) as part of the municipality's review of the benchmark rate calculations. Without such actual cost information, the ability of a franchising authority to regulate rates properly will be impaired. At the same time, the Commission concluded that franchising authorities must protect confidential business information from disclosure. To authorize franchising authorities to obtain actual cost information while protecting a cable operator's confidential business information, the Commission adopted § 76.398 which provides as follows:

§ 76.938 Proprietary information.

A franchising authority may require the production of proprietary information to make a rate determination and in such cases must apply procedures analogous to those set forth in § 0.459 regarding requests for confidentiality.

With respect to the protection of proprietary information, footnote 349 of the Report and Order states:

Specifically, franchising authorities will be required to adopt procedures analogous to those contained in Section 0.459 of the Commission's Rules. Under this rule, the party submitting information must request confidentiality with respect to specific portions of the material and make a showing, by a preponderance of the evidence, that non-disclosure is consistent with the provisions of the Freedom of Information Act, 5 U.S.C. § 552. In particular, as explained in greater detail in the cable programming services section, exemption 4 of the FOIA authorizes the Commission to withhold from public disclosure confidential commercial or financial information. If a franchising authority denies a request for confidentiality, the cable operator should be able to seek review of that decision from the Commission within 5 working days, and release of the information will be stayed pending review. See generally 47 C.F.R. § 0.459.

(ii) The promise of confidentiality is authorized by the chief

In cases where a state statute is not identical to the Federal Freedom of Information Act, cable operators can be expected to argue that a state's exemption does not protect proprietary information as required by § 76.398 and therefore the cable operator cannot be required by franchising authorities to produce any proprietary information pursuant to § 76.398.

Many state Freedom of Information Acts or similar statutes provide that if a court determines that an exemption relied upon by a municipality is not applicable, the municipality must pay the prevailing party's attorney fees.³ Such fees can easily be in the tens of thousands of dollars. Unless the relationship between § 76.398 and state Freedom of Information Acts is clarified by the Commission, franchising authorities may be faced with risking a legal challenge under a state Freedom of Information Act (and exposing themselves to significant attorneys fees liability) by complying with § 76.398. This risk may deter some municipalities from pursuing rate regulation. Moreover, cable operators may use this issue to challenge the certification of a franchising authority that it has adopted regulations consistent with the Commission's regulations. If successful, such a challenge could require this Commission to regulate rates for basic cable service.

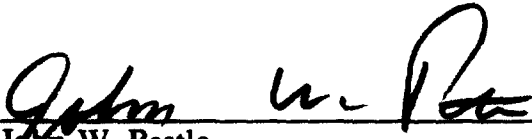
It is apparent from the Report and Order that the Commission does not intend to place unnecessary obstacles in the path of effective rate regulation by local franchising authorities. But this could occur if § 76.938 is not clarified because cable operators are likely to claim that essentially all data on their business operations which a franchising authority needs to do a meaningful job of rate regulation is "proprietary".

³See, for example, Section 10(4) of the Michigan Freedom of Information Act (MCLA § 15.240(4)).

The simplest solution is to eliminate this potential obstacle to effective rate regulation by making clear in the Rules that to the extent state or local laws are not identical to the requirements of § 76.938 they are preempted.⁴ Alternatively, the Commission could simply delete the requirement that the franchising authority must apply procedures analogous to § 0.459. This also makes sense, given that many state utility

of economy and brevity, Michigan C-TEC Communities do not comment at length on these petitions.

Respectfully submitted this 18th day of June, 1993.


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